

E-FILED ON 2/23/07

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SANTANA ROW HOTEL PARTNERS, L.P.,

No. C05-00198 JW (HRL)

Plaintiff,

v.

**ORDER DENYING IN PART ZURICH
AMERICAN INSURANCE COMPANY'S
MOTION TO EXCLUDE EXPERT
DISCLOSURES**

ZURICH AMERICAN INSURANCE
COMPANY, GALLAGHER-PIPINO, INC. and
ARTHUR J. GALLAGHER & CO.,

[Re: Docket No. 221]

Defendants.

Defendant Zurich American Insurance Company ("Zurich") moves to exclude the January 30, 2007 report of plaintiffs' expert, Paul Hamilton. Plaintiff Santana Row Hotel Partners, L.P. ("SRHP") opposed the motion. This court held an expedited hearing on February 20, 2007. Upon consideration of the papers filed by the parties, as well as the arguments of counsel, this court denies the motion in part.

I. BACKGROUND

This is a diversity action for alleged breach of contract and fraud. SRHP is the owner and operator of the Hotel Valencia located at Santana Row. It claims that it is an insured under a builder's risk insurance policy issued by Zurich and that the policy covers losses it sustained in a fire at Santana Row on August 19, 2002. Zurich denies that it agreed to insure plaintiff under the policy or that it authorized others to bind coverage on plaintiff's behalf.

Pursuant to the District Court's Scheduling Order, expert disclosures were to have been made by November 22, 2006. (Rebuttal expert disclosures, if any, were due by December 29, 2006.) SRHP disclosed its "bad faith" expert, Paul Hamilton, and timely served his expert report. However, on January 30, 2007 – the eve of the date set for Hamilton's deposition, and 69 days after the report deadline – SRHP served a second report from Hamilton which, SRHP acknowledges, contains new opinions that were not previously disclosed. Zurich now moves for an order, pursuant to Fed.R.Civ.P. 37(c)(1), precluding plaintiff from using Hamilton's January 30, 2007 report because it was untimely.

II. LEGAL STANDARD

There is some question over the proper standard to be applied in resolving the instant motion. Zurich suggests that the court's inquiry is limited to determining whether there was good cause for the delayed disclosure. *See Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992) ("Although the existence or degree of prejudice to the party opposing the modification [of a scheduling order] might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification. . . . If that party was not diligent, the inquiry should end."). However, SRHP argues that the court must also consider other factors, including whether Zurich has been prejudiced and whether other, less drastic sanctions are available.

Rule 37(c)(1) of the Federal Rules of Civil Procedure provides, in relevant part that "[a] party that without substantial justification fails to disclose information required by Rule 26(a) . . . is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." FED.R.CIV.P. 37(c)(1). "In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions," including (1) the payment of reasonable expenses and attorney's fees; (2) any of the sanctions authorized by Fed.R.Civ.P. 37(b)(2)(A), (B), and (C); and (3) informing the jury of the failure to make the disclosure. *Id.*

Sanctions under Fed. R. Civ. P. 37(c)(1) have been described as "self-executing" and "automatic." *See* Advisory Committee Notes to Fed.R.Civ.P. 37 (1993 Amendments) (stating

that the rule “provides a self-executing sanction for failure to make a disclosure required by Rule 26(a)”; *see also Yeti By Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001) (acknowledging that the sanction under Fed.R.Civ.P. 37(c)(1) is “self-executing” and “automatic”). Nevertheless, the text of the rule itself indicates that some consideration must also be given to the harm (if any) caused by the alleged failure. *See* FED.R.CIV.P. 37(c)(1); *see also* Advisory Committee Notes to Fed.R.Civ.P. 37 (1993 Amendments) (“Limiting the automatic sanction to violations ‘without substantial justification’ coupled with the exception for violations that are ‘harmless,’ is needed to avoid unduly harsh penalties in a variety of situations”). The burden is on the party facing sanctions to prove harmlessness. *Yeti By Molly, Ltd.*, 259 F.3d at 1107.

Moreover, SRHP has cited authority indicating that, before sanctions are imposed, the court should apply a five-factor test: (1) the public’s interest in expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions. *Wendt v. Host Int’l, Inc.*, 125 F.3d 806, 814 (9th Cir. 1997) (citing *Wanderer v. Johnson*, 910 F.2d 652, 656 (9th Cir. 1990)).

III. DISCUSSION

Preliminarily, this court notes that the instant motion presents a purely procedural issue – that is, whether Hamilton’s second report should be excluded as untimely. In resolving this dispute, this court expresses no opinion as to Hamilton’s qualifications or the substance of the opinions and testimony he seeks to offer. (Reportedly, questions concerning experts’ qualifications and testimony will be the subject of motions to be heard by the District Court in April.)

Hamilton’s second report is untimely, and SRHP has failed to show good cause for the belated disclosure. It contends that Hamilton’s disclosures are consistent with Fed. R. Civ. P. 26(a) and the District Court’s Scheduling Order. That is, it asserts that Hamilton’s first report, which was timely served, is complete as to the opinions it presents and therefore complies with Fed. R. Civ. P. 26(a). However, Fed. R. Civ. P. 26 requires an expert’s disclosure to “contain a

1 complete statement of all opinions to be expressed and the basis and reasons therefor . . .”
2 FED.R.Civ.P. 26(a)(2). SRHP does not contend that Hamilton’s second report is a
3 supplementation pursuant to Fed. R. Civ. P. 26(e). Quite the contrary, it acknowledges that
4 Hamilton’s second report presents entirely new opinions and that a substantial portion of the
5 materials upon which those new opinions are based were available to Hamilton at the time he
6 prepared his first report.

7 Moreover, this court is unpersuaded that Hamilton’s new report is authorized by the
8 District Court’s Scheduling Order. Here, SRHP points out that paragraph 9 of that order states:

9 Unless the parties enter into a written stipulation otherwise, upon
10 timely objection, an expert witness shall be precluded from testifying
11 about any actions or opinions not disclosed prior to the expert’s
12 deposition. This is to ensure that all factual material on which expert
13 opinion may be based and all tests and reports are completed prior to
14 expert deposition.

15 (Ellenberg Decl., Ex. A (Scheduling Order, ¶ 9)). According to SRHP, this provision indicates
16 that the expert’s deposition date – and not the court-ordered disclosure deadline – is the actual
17 deadline for any expert disclosure. In essence, SRHP argues that a party is authorized to make
18 new expert disclosures whenever it wants, so long as the disclosure is made before the expert’s
19 deposition – including, as apparently was the case here, disclosure of new opinions less than
20 twenty-four hours before the deposition is to take place. SRHP further contends that, under this
21 scheme, an expert’s deposition may be postponed for as long as necessary to allow the opposing
22 party to review any new disclosures. It argues that Zurich could have chosen to proceed with
23 Hamilton’s deposition on January 31, 2007 deposition as noticed (thereby cutting off
24 Hamilton’s ability to provide any new reports after that date), but instead chose to postpone the
25 deposition in light of his new report.

26 However, this court does not agree that the Scheduling Order was intended to provide an
27 indefinite window of opportunity for an expert to disclose his opinions and the bases for them.
28 Such a reading would reduce the court-ordered disclosure deadlines to trivialities and
undermine both the court’s ability to effectively manage its docket and the public’s interest in
efficient and expeditious resolution of cases. Further, as was the situation here, SRHP’s

1 interpretation of the Scheduling Order would place the opposing party in the untenable position
2 of having to either (a) postpone an expert's noticed deposition (and worry that yet another
3 report might show up before it's finally taken) or (b) proceed with the deposition with minimal
4 time to digest the expert's new opinions. This court does not believe that the Scheduling Order
5 intended or contemplated such a result.

6 Nor has SRHP convincingly demonstrated that Hamilton's eye condition was the true
7 reason for the delay. The District Court previously granted an extension of the expert
8 disclosure deadline which was, at one point, set for September 15, 2006. SRHP acknowledges
9 that Hamilton's eye condition was a factor in securing that earlier extension. Additionally, at
10 oral argument, plaintiff's counsel confirmed that Hamilton (a) was aware of the court-ordered
11 deadlines and (b) did not indicate that he needed more time to review materials at the time he
12 completed his first report.

13 This court cannot condone the apparent casual disregard of the court-ordered expert
14 disclosure deadlines. Indeed, "[a] scheduling order 'is not a frivolous piece of paper, idly
15 entered, which can be cavalierly disregarded by counsel without peril.'" *Johnson*, 975 F.2d at
16 610 (quoting *Gestetner Corp. v. Case Equip. Co.*, 108 F.R.D. 138, 141 (D. Me. 1985)). At the
17 same time, however, it appears that not even plaintiff's counsel was expecting Hamilton's
18 second report. Indeed, the record presented indicates that Hamilton simply walked into
19 plaintiff's counsel's office on January 29, 2007 and surprised him with the new report. (*See*
20 *Jones Decl.*, ¶ 8).

21 Moreover, this court finds that Zurich will not be seriously prejudiced by the delayed
22 disclosure – or that any harm to Zurich is curable. The discovery cutoff was and remains
23 February 23, 2007. However, SRHP agrees to produce Hamilton for deposition even after the
24 discovery cutoff in order to provide Zurich more time to review his new report. Based upon
25 defense counsel's answers to the court's questions at the hearing, it is apparent that Zurich is
26 not seriously contemplating the preparation of report(s) to rebut Hamilton's January 30, 2007
27 disclosure; and, SRHP argues that there is ample time under the current scheduling order to
28 accommodate a post-cutoff deposition of Hamilton. No trial date has been set, and the District

1 Court has recently extended the deadline for hearing dispositive motions and continued the
2 preliminary pretrial conference to September 2007. The parties do not expect that the instant
3 action will be set for trial until Fall 2007, at the earliest.

4 At oral argument, Zurich argued that it has been prejudiced because its experts complied
5 with the court-ordered disclosure deadlines (and stopped their work by those dates), whereas
6 Hamilton took over two additional months to complete his work. In other words, according to
7 Zurich, the real inequity would be to allow plaintiff to flout court-ordered disclosure deadlines
8 with impunity. While Zurich's irritation is certainly understandable, its counsel was not able to
9 articulate to the court's satisfaction any showing that the quality or completeness of defendant's
10 experts' reports would have been better if they had had more time to do them. However, the
11 court does conclude that Zurich has been harmed to the extent that it has been required to
12 devote time and resources to litigating the instant motion. Moreover, its counsel, having
13 already prepared once for Hamilton's deposition, will have to re-prepare for his deposition a
14 second time (although, as noted at the motion hearing, this court does not believe that time
15 spent preparing for Hamilton's deposition with respect to his new report will be time wasted).

16 Although it is a close question, this court concludes that, under the unique circumstances
17 presented here, the sanction of exclusion is not warranted. Nevertheless, it will order plaintiff
18 to pay monetary sanctions for the unnecessary expenses caused by the failure to timely provide
19 Hamilton's complete disclosures.

20 IV. ORDER

21 Based on the foregoing, IT IS ORDERED THAT Zurich's motion to exclude
22 Hamilton's new report is DENIED. However, Zurich is invited to file detailed declaration(s)
23 (a) itemizing with particularity the otherwise unnecessary expenses (including attorney fees)
24 incurred in connection with the instant motion which were directly caused by Hamilton's
25 belated disclosure; and (b) setting forth an appropriate justification for any attorney-fee hourly
26 rate claimed. Zurich's declaration(s) shall be filed within three court days after Hamilton's
27 deposition is completed. Plaintiff may file a response, with any such response to be filed within
28 three court days after Zurich's declaration(s) are filed. Unless this court orders otherwise, the

1 declaration(s) and responsive papers will be taken under submission without further oral
2 argument.

3 Dated: February 23, 2007

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6 HOWARD R. LOYD
7 UNITED STATES MAGISTRATE JUDGE
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5:05-cv-198 Notice will be electronically mailed to:

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